Supreme Court, U.S.
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No. 94-595

In The

Supreme Court of the United States

October Term, 1994

ILQ INVESTMENTS, INC., a Minnesota corporation, and EXCALIBUR GROUP, INC.,

Petitioners,

v.

CITY OF ROCHESTER, a municipal corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The City Attorney of the City of Rochester, Minnesota, on behalf of the City of Rochester, respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks the review of the decision of the Eighth Circuit Court of Appeals in this case. The Eighth Circuit opinion is reported as *ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413 (8th Cir. 1994).

In its decision, the Eighth Circuit reversed the granting of a preliminary injunction by the United States District Court for the District of Minnesota, reported as *ILQ Investments, Inc. v. City of Rochester,* 816 F.Supp. 516 (D. Minn. 1993). The Petition should be denied because the

Petitioner [hereinafter "ILQ"] failed to show why this Court should exercise its extraordinary and discretionary jurisdiction to review the Eighth Circuit decision that Rochester Ordinance No. 2590 will likely prevail against ILQ's First Amendment and due process claims.

STATEMENT OF THE CASE

In early 1987, the City of Rochester Common Council discussed the close proximity of adult bookstores in the Rochester downtown area. Concerned about the possible adverse secondary effects from the concentration of adult establishments, the Council began an extensive study of the concentration of adult businesses and any problems that might occur when adult uses are located in close proximity to one another and other uses. Appendix at A-139.

In April, 1988, after conducting a study of adult entertainment uses, their adverse secondary effects, and holding several public hearings, the Council enacted Ordinance Number 2590 which is a zoning ordinance defining and restricting the location of "adult establishment uses." Appendix at A-141. According to the Ordinance, an adult establishment cannot be located less than 750 feet from any residential district boundary, church, school, or from any youth facility. Appendix at A-22. The Ordinance defines an "adult establishment use" to include an "adult bookstore" which it defines as a business selling printed matter if a substantial or significant portion of the material is characterized by an emphasis

on "specified sexual activities" or "specified anatomical areas." Appendix at A-14 – A-15.

In the summer of 1992, four years after passage of Ordinance Number 2590, ILQ opened the Downtown Book and Video store on the main floor of a commercial building in the premises formerly occupied by a retail china shop in downtown Rochester, Minnesota. Appendix at A-27. Downtown Book and Video segregates forty percent of its floor space into an adults-only area selling sexually explicit books, magazines, and novelty items that account for fifty percent of the store's total sales. Appendix at A-28.

On August 7, 1992, the Zoning Administrator issued two Notices of Violation. Appendix at A-26. The relevant notice alleged that ILQ was in violation of Ordinance No. 2590 as the store was an adult bookstore located within 750 feet of a youth facility (in this case, a public library). The Notices were upheld in subsequent administrative appeals. Appendix at A-34. ILQ did not challenge the Notices in state court. Appendix at A-136.

Instead, on November 4, 1992, ILQ filed an action with the federal district court in St. Paul, Minnesota, alleging that Ordinance No. 2590 violated the First Amendment. Appendix at A-1. ILQ does not contest that its business is located within 750 feet of the public library, nor do they contest that the public library constitutes a youth facility. Appendix at A-114.

On February 22, 1993, the district court granted a preliminary injunction enjoining the City "from taking any action, civil or criminal, to enforce the provisions of Ordinance No. 2590 against [ILQ]." Appendix at A-111. The

district court concluded that ILQ is likely to succeed on the merits of its constitutional challenge because the definition of "adult bookstore" was impermissibly vague, and because Rochester unreasonably relied upon other cities' studies to justify the Ordinance. Appendix at A-132.

Rochester appealed the preliminary injunction to the Eighth Circuit Court of Appeals challenging the district court's conclusion that ILQ is likely to succeed on the merits of its constitutional claims. Appendix at A-137. Concluding that Ordinance No. 2590 will almost certainly survive constitutional challenge under *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), the Eighth Circuit reversed the preliminary injunction. Appendix at A-135.

According to the Eighth Circuit decision, *City of Renton* allows Rochester to rely upon studies or evidence supplied by other cities so long as that information is reasonably believed to be relevant to the problem the city wishes to address. Appendix at A-143. The Eighth Circuit also held that Rochester's definition of adult bookstore may refer to a substantial or significant portion of the bookstore's material based upon the decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). Appendix at A-145. Petitioners now seek a Writ of Certiorari from this Court.

REASONS FOR DENYING THE PETITION

The Court should exercise its discretion by not granting the Petition because it fails to show any "special and important reasons" justifying this Court's review of the

Eighth Circuit decision. Sup. Ct. R. 10.1. The Eighth Circuit decision does not conflict with a decision of this Court nor with any decisions of other United States Courts of Appeal. *Id.* at 10.1(a). Because this case does not meet the standard this Court established for granting review on Writ of Certiorari, the Petition should be denied.

I. THE PETITIONERS FAILED TO SHOW WHY THIS COURT SHOULD EXERCISE ITS EXTRAORDINARY AND DISCRETIONARY JURISDICTION TO REVIEW THE EIGHTH CIRCUIT DECISION UPHOLDING THE CONSTITUTIONALITY OF ROCHESTER ORDINANCE NO. 2590.

A. The Eighth Circuit decision is not a final decision.

The Eighth Circuit addressed the federal district court's grant of a preliminary injunction. No court has made a final decision regarding the merits of ILQ's lawsuit and the matter remains unresolved. Indeed, the federal district court in St. Paul, Minnesota, is scheduled to hear a summary judgment motion in this case on November 10, 1994.

The customary judicial practice is to decline to reach and decide constitutional issues until compelled to do so. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952). Interlocutory relief, which is the only decision reached in this case, does not compel this Court to reach any constitutional issue. "In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Brown*

v. Chote, 411 U.S. 452, 457 (1973). *See also University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981). Thus, this Court's standard of review for interlocutory relief does not require any analysis of the applicable constitutional issues.

Accordingly, the manner in which this case comes to the Court does not compel the Court to reach any constitutional issue. The Court should deny the petition on that basis alone.

B. The issues raised by Petitioners are not sufficiently important to warrant this Court's review of the Eighth Circuit decision.

ILQ contends that the Eighth Circuit decision reversing the federal district court's grant of a preliminary injunction raises serious legal issues because of conflicts with this Court's decisions and other federal court decisions. That simply is not the case. The Eighth Circuit gave full consideration to the issues and decided them correctly. The Eighth Circuit's decision complies with all of this Court's decisions and the vast majority of other court cases.

The Petition fails to raise any substantively important legal issue which requires this Court's attention. There are no novel or unique legal issues to be discussed. There are no unusual legal policy questions for the Court to resolve. This case is nothing more than one city's reliance on other cities' studies in drafting a zoning ordinance which restricts the location, but not the existence or operation, of adult entertainment businesses.

The caselaw is clear on this issue. This Court and other federal courts have made all of the needed determinations on this issue. All that the Eighth Circuit did was apply correctly the rules to this case. Recently, this Court denied review of the Eighth Circuit's decision in *Holmberg v. City of Ramsey*, 12 F.3d 140, 143 (8th Cir. 1993), *cert. denied*, ___ U.S. ___ (No. 93-1796, October 3, 1994), which addressed some of the same issues raised in this case. For the same reason, this Court's review of this case is simply unwarranted.

1. Time, Place and Manner Regulation

The Eighth Circuit determined that Rochester Ordinance No. 2590 should be analyzed as a form of time, place and manner regulation as it does not seek to ban adult entertainment uses. Appendix at A-137. Time, place and manner regulations are acceptable as they are content-neutral and intended to serve a substantial governmental interest. *City of Renton*, 475 U.S. at 46. Rochester's ordinance is content-neutral as it does not target a specific business, but instead addresses the undesirable secondary effects attributable to those businesses.

In 1988, four years *before* ILQ opened up its bookstore, the City of Rochester initiated a study in response to "concern over the effect that adult bookstores located along South Broadway were having on other businesses in their neighborhood and the downtown area in general." Appendix at A-41. After reviewing the studies performed by other cities addressing similar concerns, holding a public hearing, and considering the recommendations of its Planning and Zoning Commission, the Rochester

Common Council amended its zoning code to restrict the location of adult entertainment uses.

Specifically, the Council adopted Ordinance No. 2590 after determining that other cities' studies "are relevant to the existing or foreseeable impacts which such uses can have on the areas surrounding them in this city." Appendix at A-141. Rochester followed a process virtually identical to the one recently upheld in *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1258 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1992).

Indeed, it would appear that there was more evidence before the Rochester Common Council when it enacted Ordinance No. 2590 than when other governing bodies enacted similar ordinances. In *Young v. American Mini Theatres*, the legislative body had before it the testimony of a single expert concerning the effect of adult businesses on neighborhoods. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 828-29 n.9 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980), the legislative body had nothing more before it than a county health officer's report. Yet, despite this sparse record, the Fourth Circuit held that "the record does show that the sponsor of the legislation was concerned to bring these secondary effects to the legislature's attention." *Id.* at 828. *See also Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 863 (8th Cir. 1994) (ordinance is content-neutral even if there is some evidence that it was enacted to suppress otherwise protected speech). The evidence overwhelmingly supports the Eighth Circuit's holding that the legislative process leading up to the enactment of Ordinance No. 2590 was "thorough" (Appendix at A-141) and directed at the adverse effects associated with adult businesses

(Appendix at A-143). Rochester's Ordinance is properly analyzed as a time, place and manner regulation addressing adverse effects rather than a specific form of expression. Accordingly, there is no need for this Court's attention to this issue.

2. Substantial Governmental Interest

As this Court explained in *City of Renton*, a city may establish its substantial interest in its regulation by compiling a record with evidence that may be "reasonably believed to be relevant to the problem that the city addresses." *City of Renton*, 475 U.S. at 51-2. A city must show "some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses." *Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988).

As noted, Rochester relied upon studies of other cities in reaching its conclusion that regulations were needed to reduce adverse secondary effects from adult businesses. A legitimate governmental purpose may be shown by reasonable inference from specific testimony of individuals, local studies, or the experiences of other cities. *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

Yet, ILQ argues that Rochester must disregard those studies as they do not address the precise form of business which ILQ operates (i.e., a bookstore offering non-adult as well as adult materials). As noted by the Eighth Circuit decision in this case, "[t]hat is simply not the

law." Appendix at A-143. Just last zyear, the Eighth Circuit made this point very clear. *Holmberg v. City of Ramsey,* 12 F.3d at 143 ("Because the City reasonably believed the studies were relevant to the problems in Ramsey, the City satisfied its burden.")

The law is clear that all the city must show is that it relied upon evidence it "reasonably believed to be relevant to the problem that the city addresses." *City of Renton,* 475 U.S. at 51-2. Courts have not invalidated ordinances where the specific use regulated by the ordinance is not identical to the uses considered in the secondary effects study. In *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165, 1169 (4th Cir. 1986), the Fourth Circuit rejected the argument which the Petitioners advance in this case. Instead, the court ruled that "a court in constitutional review need only conclude that the City has advanced sufficient government interests." *Id.* Other courts reached a similar conclusion. *See e.g., T-Marc, Inc. v. Pinellas County,* 804 F.Supp. 1500, 1503 (M.D. Fla. 1992) ("Thus, *Renton* only requires that the evidence relied upon is reasonably believed to be relevant to the problem. *Renton* does not require comparisons to other types of establishments.").

Even if the ILQ's argument is correct and Rochester was required to study adult businesses identical to that operated by Petitioners, the Eighth Circuit determined that those studies relied upon by Rochester did *not* deal solely in adult material. The Indianapolis and St. Paul studies, relied upon by Rochester, identified and described adverse secondary effects *"specifically attributable to adult bookstores."* Appendix at A-142 (emphasis in original).

Rochester acted reasonably in relying on other cities' studies of adverse secondary effects from adult entertainment businesses. The Eighth Circuit acted correctly in relying on this Court's decision in *City of Renton* in its holding that "Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix." Appendix A-143. Perhaps it was the Third Circuit which said it best when it stated that a legislative body "does not need to survey every adult book store in the state to determine the effect the statute or regulation will have on each." *Mitchell v. Com'n on Adult Entertainment Est.*, 10 F.3d 123, 138 (3d Cir. 1993).

All that the Constitution requires is that the city reasonably believe the studies are relevant. That is all this Court required in *City of Renton* and all that should be required of Rochester in this case. Accordingly, there is no need for this Court's attention to this issue.

3. Failure to substantiate statutory vagueness.

Contrary to ILQ's argument, the limiting terms "characterized by an emphasis" (as to sexually explicit material) and "substantial portion" (as to a bookstore's merchandise) are not overly broad. The term "characterized by an emphasis" was upheld by this Court in *American Mini Theatres* and by subsequent federal courts. And, as the Eighth Circuit noted in this case,

> [t]he limiting term, "substantial portion" of a bookstore's merchandise, which ILQ characterizes as impermissibly vague, appears frequently

> in the United States Code. *See, e.g.*, 42 U.S.C. §2000a(c) ("The operations of an establishment affect commerce if a substantial portion of the food which it serves . . . has moved in commerce.").

Appendix at A-145.

The vast majority of courts find no inherent vagueness in the use of these terms as part of the definition of adult bookstore. In *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1296 (6th Cir. 1986), the Sixth Circuit rejected the argument ILQ advances in this case and held that "the terms of the statute are found throughout the law and are within the understanding of ordinary people." In *S&G News, Inc. v. City of Southgate*, 638 F.Supp. 1060 (E.D. Mich. 1986), *aff'd* 819 F.2d 1142 (6th Cir. 1987), the federal district court upheld the term "substantial or significant portion" based upon *American Mini Theatres*.

These are not isolated cases addressing the vagueness issue. There are many more federal cases reaching a similar holding. *See also Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) ([w]e find no real and substantial ambiguity here, and to the extent that 'regular' is vague, state courts may clarify it without insuperable difficulty"); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F.Supp. 803, 820 (E.D. Mich. 1985) (terms "substantial or significant portion" were reasonably specific and precise); *Nortown Theatre Incorporated v. Gribbs*, 373 F.Supp. 363, 367 (E.D. Mich. 1974), *aff'd on other grounds sub nom., Young v. American Mini Theatres*, 427 U.S. 50 (1976) ("the word 'substantial' as used in the

definition of Adult Book Store is not so indefinite as to render the ordinance void and unenforceable").

The vast and overwhelming majority of cases are clear. The phrases "substantial or significant" and "characterized by an emphasis on" are not unconstitutionally vague. This court, and other courts as well, have previously visited this issue and there is simply no need to revisit it. ILQ's "vagueness" argument provides no reasonable basis for this Court to grant certiorari in this case.

4. Lack of Conflicting Decisions

ILQ contends that the Eighth Circuit's decision in this case conflicts with this Court's decisions and those of the federal courts of appeal. In truth, as noted throughout this response, the Eighth Circuit's decision complies with all of this Court's decisions and the vast majority of federal and state court cases. Indeed, the Eighth Circuit's intervention in this case occurred solely because the federal district court's granting of the preliminary injunction deviated from the applicable caselaw (especially *City of Renton*).

ILQ cites two federal district court cases and one state court case as authority for a finding that the Eighth Circuit's decision here as to the vagueness issue "is in conflict with long-established decisions of this court, with opinions from other federal circuits, and with opinions from state courts of last resort." Appendix at A-20. *Cline v. City of Oklahoma City,* 839 P.2d 657 (Okla. Crim. App. 1992); *Pensack v. City and County of Denver,* 630 F.Supp. 177

(D. Colo. 1986); *Ellwest Stereo Theater v. Boner*, 718 F.Supp. 1553 (M.D. Tenn. 1989).

There is no need to review the facts of these cases and compare them to the facts of this case. The important fact is that these decisions have never been cited by any federal court in determining the applicable federal law on the vagueness issue. ILQ's attempt to conjure up a conflict will not succeed. There is no conflict and, accordingly, there is no reason this Court must visit this issue.

Similarly, ILQ relies upon *World Wide Video v. City of Tukwila*, 816 P.2d 18 (Wash. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 1672, 118 L.Ed.2d 391 (1992) for the proposition that a city must show that an adult business will produce the precise secondary effects which are addressed in other cities' studies. *World Wide Video* involved a business where only 10% of the material was adult-oriented. (This case involves a business where 40% of the material is adult-oriented. Appendix at A-135.) Furthermore, the majority opinion in *World Wide Video* noted that the Washington Constitution affords greater protection for speech than does the United States Constitution. The state court decision in *World Wide Video* has not been followed by other federal courts.

ILQ also places significant emphasis on *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987). *Tollis* reached one issue and one issue only. "Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community." *Tollis*, 827 F.2d at 1333. That "single showing" issue is *not* an issue in this case. True, ILQ raised it below, but the Eighth Circuit did not address nor

discuss it at all. Thus, *Tollis* is simply inapplicable to this case.

Indeed, at least one federal court refused to consider *Tollis* on the basis that it was based upon particular factual circumstances which were not present in the case before it. "The conclusions set forth in these cases [*Tollis*], therefore, do not control in the instant case." *Mitchell v. Com'n on Adult Entertainment Est.*, 802 F.Supp. 1112 (D. Del. 1992), *aff'd*, 10 F.3d 123 (3d Cir. 1993).

The Eighth Circuit's decision is not a deviation from the vast majority of applicable federal cases addressing similar issues. The Eighth Circuit realized that Rochester's Ordinance is patterned after a Detroit ordinance upheld by this Court in *Young v. American Mini Theatres.* The Eighth Circuit's decision is one of many decisions reaching similar conclusions concerning a time, place and manner regulation addressing adult businesses' adverse secondary effects. Thus, there is no compelling reason why this Court must re-address these same and repetitive issues.

C. PETITION SEEKS TO ADDRESS ISSUES NOT RAISED BELOW AND NOT DECIDED UPON BELOW.

ILQ raises issues in its Petition which were never addressed by the Eighth Circuit decision below or, if raised, were never decided. ILQ argues that Rochester's Ordinance makes a single sale or rental of sexually-explicit material a basis for determining an establishment to be an adult establishment. Petition at 22. ILQ also

argues that the Eighth Circuit held that ILQ lacked standing to pursue its vagueness claim (Petition at 9) and that ILQ should have brought their claims in state court (Petition at 18).

A close reading of the Eighth Circuit's decision, however, clearly reveals that the court below never addressed the "single sale or rental" issue. There is no mention of this issue anywhere in the opinion below. Additionally, the Eighth Circuit only discussed, but never decided the standing and state court issues. Appendix at A-144, A-146.

This Court avoids issues not addressed by the court of appeals. *United States v. United Continental Tuna Corp.* 425 U.S. 164 (1976). "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget,* 486 U.S. 94, 100 n.5 (1988).

The Eighth Circuit did not base its decision on the single sale, standing, or pursuit of state remedies issues. Instead, the court below found Rochester's Ordinance likely to survive a constitutional attack as a result of a time, place and manner analysis and case law discussing the void-for-vagueness doctrine. Accordingly, ILQ's attempt to include these issues in its Petition for Certiorari is inappropriate and should be disregarded.

CONCLUSION

Petitioners failed to show why this Court should exercise its extraordinary and discretionary jurisdiction to review the Eighth Circuit's decision upholding the constitutionality of Rochester Ordinance No. 2590. Accordingly, Respondent requests the Petition be denied.

Respectfully submitted this 2nd day of November, 1994.

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